(2)

Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

No. 95-955

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIELLE GORDON, PETITIONER

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA C. BIDDLE
EDWARD HIMMELFARB
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

16 pp

QUESTION PRESENTED

Whether the court of appeals correctly upheld the method by which the Secretary of Health and Human Services (now the Commissioner of Social Security) computed the amount of in-kind rental income chargeable to petitioner, a Supplemental Security Income (SSI) recipient.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Discussion	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)	9, 10
Ceguerra v. *Secretary of Health and Human Services*, 933 F.2d 735 (9th Cir. 1991)	10
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	9
Hickman v. *Bowen*, 803 F.2d 1377 (5th Cir. 1986)	10
Jackson v. *Schweiker*, 683 F.2d 1906 (7th Cir. 1982)	3, 4, 8
Rothman v. *Schweiker*, 706 F.2d 407 (2d Cir.), cert. denied, 464 U.S. 984 (1983)	8
Ruppert v. *Bowen*, 871 F.2d 1172 (2d Cir. 1989)	4, 8
Thomas Jefferson University v. *Shalala*, 114 S. Ct. 2381 (1994)	9
United States v. *Mendoza*, 464 U.S. 154 (1984)	12

Statutes and regulations:

42 U.S.C. 1381	2
42 U.S.C. 1382(a)	2
42 U.S.C. 1382(b)	2
42 U.S.C. 1382a	2
42 U.S.C. 1382b	2
20 C.F.R.:	
Section 416.1102	2
Section 416.1123(c)	2
Section 416.1130	3

Regulations—Continued: Page

Section 416.1130(a) 2
Section 416 1130(b) 3
Section 416.1131 3
Section 416.1140 3

Miscellaneous:

55 Fed Reg. (1990):
p. 28,947 4
p. 28,949 4
57 Fed. Reg. 40,919 (1992) 10-11

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-955

DANIELLE GORDON, PETITIONER

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A5-A15) is reported at 55 F.3d 101. The order of the court

[1] Section 105(a)(1) of the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1472, transferred the functions of the Secretary of Health and Human Services "with respect to or in support of the programs and activities the administration of which is vested in the Social Security Administration" to the Commissioner of Social Security, effective March 31, 1995. Under Section 106(d) of the Act, 108 Stat. 1477, Shirley S. Chater, Commissioner of Social Security, should be substituted for Donna E. Shalala, Secretary of Health and Human Services, as the respondent in this action.

of appeals denying rehearing (Pet. App. A3-A4) is unreported. The opinion of the district court (Pet. App. A16-A27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1995. The petition for rehearing was denied on September 18, 1995. The petition for a writ of certiorari was filed on December 18, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Supplemental Security Income (SSI) program "provide[s] supplemental security income to individuals who have attained age 65 or are blind or disabled." 42 U.S.C. 1381. A person's eligibility is determined on the basis of her income and resources. 42 U.S.C. 1382(a); see 42 U.S.C. 1382a (defining income and exclusions from income); 42 U.S.C. 1382b (defining exclusions from resources). An eligible recipient receives a flat monthly benefit, which is reduced by the amount of the recipient's non-excluded income. 42 U.S.C. 1382(b). Non-excluded income may take the form not only of cash but also of things or services received in kind that can be used to meet the recipient's needs for food, clothing, and shelter. 20 C.F.R. 416.1102.

In determining the value of in-kind income for purposes of calculating the amount of benefits, the Social Security Administration values unearned in-kind income at its current market value, except when that income takes the form of "in-kind support and maintenance"—*i.e.*, food, clothing, or shelter. 20 C.F.R. 416.1123(c), 416.1130(a). If the recipient lives in the household of another person who provides the

recipient with food and shelter, the in-kind support and maintenance is valued at one-third of the recipient's total SSI benefit entitlement, before exclusions. 20 C.F.R. 416.1131. Otherwise, the Secretary employs a "presumed value rule," under which the in-kind support and maintenance is presumed to have a maximum value of one-third of the benefit rate plus the SSI program's general income exclusion of $20. A recipient may rebut that presumption by showing that either (i) the current market value of the in-kind support and maintenance minus the amount paid for it by the SSI recipient, or (ii) the actual amount paid for it by the donor, is lower than the presumed value. If the presumption is rebutted, SSI benefits are reduced by the amount shown to be the value of the in-kind support and maintenance. 20 C.F.R. 416.1140.

The Secretary has also addressed the situation where there is a parent-child relationship between landlord and tenant and where the landlord charges the recipient-tenant less than the fair market value for rent. In that situation, a "rental subsidy" exists, and under the regulations that subsidy qualifies as in-kind support and maintenance. If, however, the rent paid by the recipient equals the current market rental value that would be paid under an arm's-length "business arrangement," the recipient is not considered to be receiving in-kind support and maintenance. 20 C.F.R. 416.1130(b).

The regulation defining in-kind income, 20 C.F.R. 416.1130, contains a slightly different rule for recipients living in States within the Seventh Circuit. That rule was promulgated as a result of that circuit's decision in *Jackson* v. *Schweiker*, 683 F.2d 1076 (1982). Under the Secretary's "*Jackson* regulation," a recipient is deemed to have a "business arrangement"

if she is paying rent equal to or exceeding the presumed maximum value computed in the manner described above—*i.e.*, rent that exceeds one-third of the value of the recipient's overall SSI monthly entitlement plus $20. Under the *Jackson* regulation, if the actual rent paid by the recipient is below the presumed maximum value, the difference between the actual rent and the presumed maximum value (or the current market value, whichever is less) is imputed as in-kind support and maintenance. *Ibid.*

The formula contained in the *Jackson* regulation is also used in the Second Circuit, within which this case arises. In *Ruppert* v. *Bowen*, 871 F.2d 1172, 1180-1181 (1989), the Second Circuit held that an SSI recipient may be charged with receiving in-kind support and maintenance in the form of a rental subsidy only where she has received an "actual economic benefit" from the subsidy. Following *Ruppert*, the Secretary issued Acquiescence Ruling 90-2(2), 55 Fed. Reg. 28,947 (1990), which accepted the circuit's "actual economic benefit" rule for SSI recipients living in the States within the Second Circuit. The Secretary stated that, as under the *Jackson* regulation, only where an SSI recipient in one of those States paid rent that was below the presumed maximum value of one-third of the SSI entitlement plus $20, would that recipient be deemed to have received an actual economic benefit. In such an instance, the difference between the actual rent and the presumed maximum value or the current market value (whichever is less) would be imputed as in-kind support and maintenance. See 55 Fed. Reg. 28,949 (1990).

2. Petitioner is a disabled adult who lives with her parents. Between June 1986, when she began receiving SSI benefits, and December 1990, petitioner

paid $100 to her parents each month for rent and another $100 each month for food. Pet. App. A8-A9. In December 1990, she increased her monthly rent payment to $200. *Id.* at A23. When petitioner's application for SSI benefits was approved in 1986, the Social Security Administration determined that she was living in her parents' household and was receiving in-kind support and maintenance from them. Accordingly, it reduced her benefits, valuing the in-kind income at one-third of her monthly entitlement. *Id.* at A22. Following various administrative appeals and two actions filed by petitioner in district court, the parties entered into a stipulation consolidating and remanding the actions to the Secretary, in light of the Secretary's post-*Ruppert* Acquiescence Ruling. *Id.* at A23.

On remand, an administrative law judge (ALJ) found that, before December 1990, petitioner had received in-kind support and maintenance from her parents in the form of a rental subsidy, and that as a result petitioner was chargeable with $108.67 in income each month—the amount by which her $100 rent was exceeded by the presumed value of the shelter and food she had received. Pet. App. A23-A24. However, the ALJ held, with the increase in petitioner's rent payment in December 1990, she was no longer receiving in-kind support and maintenance under the Acquiescence Ruling formula, because the rent she paid was no longer below the presumed value. *Id.* at A24.

The SSA's Appeals Council substantially affirmed the ALJ's decision. It modified the amount of in-kind income chargeable to petitioner between June 1986 and November 1990, holding that petitioner had received in-kind monthly income ranging between $12

and $28.66 during that period. Those figures represented the difference between the $100 monthly rent paid by petitioner during that period and the presumed value of the shelter and food she received. Pet. App. A10. That ruling became the final decision of the Secretary.

3. Petitioner then filed this action in federal district court, seeking review of the Secretary's decision. The district court granted summary judgment to petitioner. See Pet. App. A16-A27. It held that the Secretary had misapplied *Ruppert*, because the figures used to calculate the value of petitioner's rental subsidy were "not grounded in reality," but were "just abstract calculations." *Id.* at A26. Because petitioner received $241 per month in SSI benefits and paid $100 per month to her parents for shelter, the court noted, she was left with $141 for other basic needs. *Id.* at A27. In the court's view, petitioner's "remaining purchasing power [of] $141.00 to secure other basic needs belies any notion that [petitioner] realized the benefit of either" her parents' rent subsidy or the presumed value of that subsidy. *Id.* at A27.

4. The court of appeals reversed. Pet. App. A5-A15. It held that the Secretary had used an "acceptable" legal standard in applying Acquiescence Ruling 90-2(2), which had adopted, for cases arising within the States comprising the Second Circuit, the *Jackson* regulation applicable in the Seventh Circuit. Pet. App. A11. The court noted that, in *Ruppert*, it had "not require[d] adoption of those [*Jackson*] regulations as a matter of law, [but had] suggest[ed] that they were reasonable." *Ibid.*

The court of appeals also rejected the district court's holding that petitioner's rental subsidy was

not "actually available." Pet. App. A11. The court noted that petitioner's monthly $100 payment to her parents represented only about 30% of her pre-reduction SSI entitlement, and only about 41% of her post-reduction SSI entitlement. *Ibid.*[2] Moreover, the court noted, the Secretary was not imputing the full rental subsidy to petitioner but only between $12 and $28.66 per month—the amount by which her benefits had been reduced. *Id.* at A12. Petitioner thus received "nearly the maximum monthly benefits," and had "received an 'actual economic benefit' from paying only $100 per month for shelter worth over four times as much." *Ibid.* The court of appeals also rejected petitioner's claims that the rental subsidy had in fact represented not income but a loan to petitioner from her parents, and that the Acquiescence Ruling should have been issued by notice and comment rulemaking under the Administrative Procedure Act. Pet. App. A12-A15.

DISCUSSION

Petitioner challenges the court of appeals' holding that she was correctly charged with receiving between $12 and $28.66 per month in in-kind income in the form of shelter and food between June 1986 and November 1990. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The central issue in the court of appeals was whether the Secretary, in Acquiescence Ruling 90-2(2), had correctly applied the test set forth in

---

[2] By contrast, the court noted, the SSI recipient in *Jackson* had to spend 77% of her pre-reduction income on shelter and 106% of her post-reduction income on shelter. Pet. App. A12.

Ruppert v. *Bowen*, 871 F.2d 1172 (2d Cir. 1989), for computing the amount of in-kind rental income chargeable to an SSI recipient. The court of appeals correctly held that the Secretary had properly applied that test. In *Ruppert*, the Second Circuit held that if the proportion of income that an SSI recipient spends on shelter is so great that "'it flies in the face of reality to conclude that [a rent subsidy] is "actually available" to the recipient,' the unearned income should be disregarded." 871 F.2d at 1180 (quoting *Jackson*, 683 F.2d at 1085) (internal quotation marks omitted). In other words, in-kind income cannot be imputed to a recipient unless it reflects some "actual economic benefit." 871 F.2d at 1180-1181 (quoting *Rothman* v. *Schweiker*, 706 F.2d 407, 410 (2d Cir.) (per curiam), cert. denied, 464 U.S. 984 (1983)).

In the Acquiescence Ruling, the Secretary set out the approach by which it would be determined whether a recipient had received an "actual economic benefit." The Acquiescence Ruling stated that it is realistic to expect an SSI recipient to apply roughly one-third of her benefits toward rent, and that if she pays less than that amount, she is deemed to have received a benefit by having additional funds available for other needs. That is the same formula endorsed by the Seventh Circuit in *Jackson*. As the decision below recognized, *Ruppert* approved of (but did not mandate) use of the *Jackson* formula. It stated: "The regulations used in the Seventh Circuit might provide a good indication of [actual economic benefit], though we do not necessarily require their adoption as a matter of law." Pet. App. A7 (quoting 871 F.2d at 1181). Because "actual economic benefit" under the Acquiescence Ruling "would be determined in the same way" as in the *Jackson* regulation, Pet. App. A8,

the court below properly held that the Acquiescence Ruling was consistent with *Ruppert*. Indeed, petitioner concedes that the decision below "follows" *Jackson*. Pet. 24.

2. Petitioner also asserts that the decision below conflicts with two decisions of this Court. Petitioner's claims lack merit.

a. First, petitioner argues (Pet. 10-16) that the decision conflicts with *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Petitioner's argument appears to be that the court of appeals erred in deferring to the Secretary, because the Secretary's Acquiescence Ruling had not been promulgated through notice-and-comment rulemaking under the Administrative Procedure Act. See, *e.g.*, Pet. 11, 12.

The court of appeals correctly rejected that argument as "frivolous." Pet. App. A14. The court noted that Acquiescence Rulings are simply the agency's "interpretations of its own regulations and the statute which it administers," and are therefore "entitled to deference except when they are plainly erroneous or inconsistent with the Act." *Ibid.* (citation omitted); see *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994). Moreover, because the Acquiescence Ruling here was interpretive, not substantive, it created no rights or obligations; instead, it "merely interpreted [the Second Circuit's] mandate in *Ruppert*" and "was not subject to the notice and comment requirements of the APA." Pet. App. A15.

b. Petitioner also asserts (Pet. 16-19) that the decision below conflicts with *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). In *Georgetown*, the Court stated that it would not defer to an interpretation

offered by "appellate counsel" when "the agency itself has articulated no position on the question." *Id.* at 212. Petitioner claims (Pet. 16) that the court of appeals in this case "deferred not to the Secretary's regulation, but to the Secretary's counsel's litigation strategy not to seek a regulatory amendment to clarify for the public the Secretary's substantive 'in-kind' income rule that was to be applied in the Second Circuit."

Petitioner is mistaken. In *Georgetown*, the Court addressed the situation in which appellate counsel seeks to provide an interpretation of a regulation on behalf of the agency on judicial review of an agency decision, when the agency itself had not previously adopted that interpretation. In this case, however, the Secretary has previously issued an interpretation of the pertinent regulations in the Acquiescence Ruling. Thus, the concerns expressed in *Georgetown* are inapplicable, and the court of appeals was correct to defer to the Secretary's interpretations of her own regulations.

3. Petitioner next contends (Pet. 20-21) that the decision below conflicts with the approach taken in two other circuits with regard to the situation in which an SSI recipient is loaned in-kind benefits. See *Hickman* v. *Bowen*, 803 F.2d 1377 (5th Cir. 1986); *Ceguerra* v. *Secretary of Health and Human Services*, 933 F.2d 735 (9th Cir. 1991). Petitioner is mistaken. As the court of appeals in this case noted (Pet. App. A12), *Hickman* and *Ceguerra* hold that "'in-kind loans' of support and maintenance are not 'income'" attributable to the SSI recipient in computing benefits. The Secretary has adopted the same rule in Social Security Ruling 92-8p, 57 Fed Reg.

40,919 (1992).[3] The court of appeals in this case acknowledged the "*Hickman* rule," see Pet. App. A12, but it found that rule to be inapplicable because the SSA Appeals Council "did not find [petitioner's] rental subsidy to be a loan, and there is no evidence that it was intended as such at the time." *Id.* at A13. The court rejected petitioner's claim that she presently intends to treat the in-kind subsidy as a loan, noting that the relevant issue is "whether a loan existed at the time [that the rent subsidy was made], not whether [petitioner's] mother wishes to consider it a loan now." *Ibid.* The court of appeals' resolution of that fact-bound issue does not warrant further review.

4. Petitioner finally claims (Pet. 22-24) that review is warranted because the Secretary has taken conflicting positions over time as to whether the Seventh Circuit, in 1982, correctly decided *Jackson*. That question is not presented by this case. Petitioner endorses *Jackson* and concedes (Pet. 24) that the court below "followed" *Jackson*, and there is no dispute that both the portion of the Secretary's regulation governing the Seventh Circuit and her Acquiescence Ruling governing the States comprising the Second Circuit adopt the approach taken in *Jackson*.[4]

---

[3] That Ruling abrogated an earlier Ruling and prospectively applied nationwide the principles set forth in *Hickman* and *Ceguerra*. See 57 Fed. Reg. 40,919 (1992).

[4] Petitioner's discussion of the Acquiescence Ruling manifests a misunderstanding of such rulings. In issuing those rulings, the Commissioner has chosen to acquiesce in adverse court of appeals decisions within the respective circuits, instead of seeking review of those decisions in this Court. That practice, however, in no way obligates the Comissioner to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA C. BIDDLE
EDWARD HIMMELFARB
Attorneys

FEBRUARY 1996

---

change her administration of the Act in cases involving other litigants in *other* circuits that have not rejected her legal position on a particular issue. See *e.g., United States* v. *Mendoza*, 464 U.S. 154 (1984).